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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1019

MORRIS BERMAN

Appellant,

—vs.—

JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE, JOHN R. CREWS,* J. J. DUBERSTEIN,* Constituting the Board of Elections of the City of New York, et al.,

Appellee.

* Page 1.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

Statement as to Jurisdiction

MORRIS BERMAN

Pro Se

Box 115, New York, N. Y., 10001

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Appellee.

* Resigned 1966.
** Term started 1966.

Appeal From the Court of Appeals of the State of New York

STATEMENT AS TO JURISDICTION

The Appellant, Morris Berman, a voter of the City of New York, appeals from the judgment of the Court of Appeals of the State of New York entered October 18, 1966, affirming the judgments of the courts below, which did not rule on the question of the constitutionality of a New York statute permitting voting in churches raised by said Appellant.

The Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The Court of Appeals, highest appellate court of the state, and the Appellate Division, First Department, of the state supreme court, rendered no opinions in affirming the judgment of the state supreme court, Special Term, Part 1, First Judicial District. The opinion and order of said Part I of the state supreme court, the court of original jurisdiction, is reported in New York Miscellaneous, Second Series, on Page 713 (1966), and a copy thereof is appended hereto as Appendix A. A memorandum of the Court of Appeals, referring to said opinion, appears in 18 N. Y. 2d 774 (Appendix B).

Statement on the Nature of the Case

Appellant was assigned a polling place in the 1964 state and federal election by the Appellee in a church operated building and in a room exhibiting religious symbolism, the viewing of which is not permitted by his religion (Appendix F); neither is state-imposed proselytising in compelling church [illegible] entry, even in absence of such symbolism. A change of voting and registration place was not permitted by the Appellee, and Appellant, presuming unconstitutionality of the state election law, brought an action for culpable negligence against said Appellee.

The court of original jurisdiction stated, in its opinion, that it did not assume the unconstitutionality of the state election law, and dismissed the complaint for insufficiency. This dismissal is understandable on the court's presumption of constitutionality, but since all elements of a complaint required by Rule 3014 of the state Civil Practice Act and Rules and Section 104 on Construction shown in Appendix E were complied with (complaint is shown on Pages 8 to 12 of the Record) and since the "inconsistency" allegation in the opinion was in error, and the basis for the damages, allegedly not shown, was stated in

allegation 8 of the complaint, a ruling of unconstitutionality by this Court should result in a reversal of the judgment on the constitutional issue and remanding to the state courts. As to alleged inconsistency in "voting" but not registering, there was neither, as the "voting" was not with due deliberation, owing to the strain of being involuntarily assigned to a place where symbolism, the viewing of which is prohibited by the Appellant's religion, was unexpectedly found after entering the polling place. The tort began with the assignment of a church as the Appellant's polling place, and the subsequent consequences arose from such unconstitutional polling place assignment by the Appellee. The Appellant was thus prevented from registering, and entered the building for voting only after he was led to believe no religious symbolism would be found.

The American Jewish Congress, in a brief *amicus curiae* in this case by *Stanley Geller, Leo Pfeffer* and associates requested the Appellate Division of the state supreme court to rule on constitutionality, but the state appellate courts failed to do so.

Dates of Judgments, Order and Notice of Appeal

The order of the court of original jurisdiction, the state supreme court, Part I, First Judicial District, was entered on February 25, 1966, and a judgment thereon entered March 22, 1966. This order and judgment were affirmed by the Appellate Division of the state supreme court, First Department, on June 30, 1966 and affirmed and entered by the state's highest court, the Court of Appeals, on October 18, 1966 at 2 P.M. Papers in the case were remitted to the state supreme court and filed with the clerk of New York County, where the notice of appeal was filed January 3, 1967 and amended January 16, 1967. The original notice of appeal, filed December 8th, 1966, was superseded by the notice of January 3, 1967.

Statutory Provision Sustaining Jurisdiction

The appeal is within the jurisdiction of the United States Supreme Court under Title 28 U.S. Code, Section 1257 (2), which provides that a final judgment or decree rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court of the United States as follows:

> "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Cases Sustaining Jurisdiction

Cases sustaining jurisdiction in this appeal are *Cantwell* v. *Connecticut,* 310 U.S. 96 (1940); *Engel* v. *Vitale,* 370 U.S. 421; *Everson* v. *Board of Education of Ewing Township,* 330 U.S. 1 (1947); *McGowan* v. *Maryland,* 366 U.S. 420 (1960) and *Sherbert* v. *Verner,* 374 U.S. 398 (1963).

State Statute the Validity of which is Involved

This case involves the validity of the election law of the State of New York, constituting Chapter 17 of the consolidated laws of the state. Sections 66 and 193 of said law indicate that churches may be used as polling places in general elections, which violates the Establishment, Free Exercise and Equal Protection clauses of the Constitution and the Civil Rights Act of 1964. New York is the only state in the union specifically including churches as permissible polling places in its election law. The pertinent portion of Section 66 of the law is appended in Appendix C, where the word "church" has been italicised.

Questions Presented

The following questions are presented by this appeal:

1. Whether Sections 66, 193 and other sections of the election law of the State of New York which specifically permit the use of churches as polling places in general elections violate the principle of the separation of church and state of the First Amendment to the United States Constitution and the free exercise clause thereof, made applicable to the states by the Fourteenth Amendment.

2. Whether under the Fourteenth Amendment guaranteeing citizens equal protection of the law and Section 101(2)(A) of the Civil Rights Act of 1964 a citizen of one religion may be compelled, if he wishes to exercise his voting franchise, to vote or register for voting in a church operated building of another religion into which he is not permitted to enter by laws or customs of his own religion, by reason of religious symbolism in the polling place of said building or other religious reason.

3. Whether under the First and Fourteenth Amendments to the U.S. Constitution the state may designate a church operated building as a polling place in a general state and federal election, said church being subsidized in part by the rental income paid by the state to said church for the polling place.

Manner, Method and Time of Raising Federal Questions Sought to be Reviewed

The questions of the violation of federal law were first brought before the court of original jurisdiction—the supreme court of the State of New York, by the Appellant in his Complaint (Record on Appeal, pp. 8, 9) in allegation 2:

> "That this action arises under Section 66 of the New York State Election Law, which governs the selection of polling places, and provides for voting in churches, contrary to: Amendment 1 of the U. S. Constitution, which requires the separation of church and state * * * and of the federal Civil Rights Act of 1964, which prohibits the denial of voting rights to qualified citizens. The selection of a given church by the State for all citizens in a locality to enter for voting purposes constitutes the establishment of a religion by the State in direct conflict with the First Amendment of the United States Constitution."

and in oral argument before that Court. The complaint was dismissed for alleged insufficiency.

In his brief (pp. 10-11) before the first appellate court, the Appellate Division of the Supreme Court, the Appellant cited *Everson* v. *Township of Ewing,* 330 U.S. 1 (1947), in which the prevailing opinion of the U. S. Supreme Court, by Mr. Justice Black, stated:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government * * * can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will * * *."

Before the same appellate court the Appellant cited *Engel* v. *Vitale,* 370 U.S. 421 at 429 (1962) in his Brief, in which Mr. Justice Black stated, in the opinion of the court:

> "* * * one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon * * * one particular form of religious services * * *."

Also, before the same court, the Appellant, in his Brief, Page 12, cited *Engel* v. *Vitale* (*supra*) at 437. Mr. Justice Douglas, concurring with the court's opinion, stated:

> "The point for decision is whether the Government can constitutionally finance a religious exercise. Our system at the federal and state levels is presently honeycombed with such financing. Nevertheless, it is an unconstitutional undertaking whatever form it takes * * *."

Appendix G shows a page of church polling places in New York City, having hundreds of such polling places, while there are none in Buffalo, the state's second largest city.

The unconstitutionality of state-imposed proselytising was discussed by the Appellant in allegation 5 of his complaint, Page 13 of his brief to the Appellate Division, and similarly in his Court of Appeals brief.

The application of the First Amendment to state laws as provided by the Fourteenth Amendment was stated before that court by the Appellant in citing *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), on Page 12 of his Brief.

The American Jewish Congress, in its brief *amicus curiae* to the same appellate court, cited *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and its application to religious freedom. In that case the appellant, a Seventh Day Adventist, was denied unemployment compensation on the ground that she refused to work on Saturday in a job she could perform. A state law barred her compensation. In concurring with the opinion of the Court written by Mr. Justice Brennan, Mr. Justice Douglas stated:

> "The result turns not on the degree of injury, which may indeed be non-existent by ordinary standards. The harm is with the interference with the individual's scruples or conscience—an important

area of privacy which the First Amendment fences off from the Government * * *."

The Civil Rights Act and Fourteenth Amendment were cited on Page 13 of the Appellant's brief. The Appellee in effect disqualified voters of religions other than that of the polling place church, whose religious scruples prevented them from entering, registering or voting, contrary to the Act.

That the right to religious freedom takes precedence over the right to commercial gain was established by the Sunday Closing cases, as *McGowan* v. *Maryland,* 366 U.S. 420 (1960) and cited by the Appellant in his Reply Brief at Page 22. In the instant case the financial gain to a church for polling place rentals cannot be held superior to the right of religious freedom of voters whose religious beliefs do not permit them to enter such churches or church controlled buildings.

In the Court of Appeals the above cases involving the First Amendment which were cited in the Appellant's brief to that Court were *Everson* v. *Board of Education* (*supra*) on Page 11 of the Brief, *Engel* v. *Vitale* (*supra*) on Pages 12 and 14 and *Cantwell* v. *Connecticut* (*supra*) on Page 13. The First and Fourteenth Amendments and the Civil Rights Act of 1964 (Appendix D) were cited on Page 13 of the Brief.

The indication by the court of original jurisdiction that the question of separation of church and state is one for appellate courts to determine, and the failure of the state appellate courts to decide on the constitutionality of the state election law, compelling voters to enter a church in some areas if they are not to be disenfranchised, bring this case within the statutory provision above stated to confer jurisdiction on the Supreme Court of the United States.

The Questions Are Substantial

The State of New York is the only one of the fifty in the United States which specifically permits the use of a church as a polling place, contrary to the U. S. Constitution and the federal statutes referred to. This appeal is in the nature of a test case of the legality of such church polling places, and is novel in that the question has never before been presented to a court for adjudication. Substantial questions of infringement of constitutional rights are involved, and probable jurisdiction of the Court is therefore indicated.

Respectfully submitted,

MORRIS BERMAN
Appellant Pro Se
Box 115, New York, N. Y., 10001

APPENDIX A

Order—Dated February 25, 1966

SUPREME COURT OF THE STATE OF NEW YORK,
SPECIAL TERM, PART I, NEW YORK COUNTY
at the Courthouse thereof, 60 Centre Street,
New York, 10007.

Present: HON. MITCHELL D. SCHWEITZER,
Justice

—against—

BOARD OF ELECTIONS, CITY OF N. Y., et al.

Upon the foregoing papers Defendants, the Commissioners of the Board of Election of the City of New York, move, pursuant to CPLR 3211, for dismissal of the complaint for legal insufficiency.

In the complaint, plaintiff seeks $100,000.00 damages, based upon the defendants' "culpable negligence", and treble that amount, based upon defendants' malice in designating a church as a voting and registration place. Plaintiff asserts that such a designation and its impact upon him, as an adherent of a different religion, caused him to fail to register in a party of his choice during the registration period prior to the November 1964 election. However, he did, according to his complaint, vote in that election, but claims that he was upset during that period. He claims that the designation constituted a violation of the constitutionally mandated separation of church and state; a deprivation of his right to freely vote, unhampered by sur-

rounding circumstances which affected his thinking and actions.

Plaintiff does not assert in his complaint, or specify in the papers submitted on this motion, the basis for the damages he claims he sustained. Inconsistency is revealed in his claim that the said designation of a church in effect prohibited his registration in a party, but did not prohibit his voting at the general election. Further, no basis apparently exists for his assertion that the respondents were guilty of culpable negligence or malice. Finally, and most compelling, is the fact that Section 66 of the Election Law mentions churches as among those specific places where registration and voting may be conducted. (See also 11 Op. State Compt. 172 (1955)).

While there may be, at least arguably, a basis for the claim of violation of the principle of separation of church and state, in respondents' actions, the instant action does not appear couched in terms proper to raise the question. Even were this court to consider that matter, it, as a court of original jurisdiction, would not assume the unconstitutionality of the law attacked.

The motion is accordingly granted and the complaint dismissed.

/s/ M. D. S.,
J. S. C.

APPENDIX B

Court of Appeals, 18 New York Reports, 2d Series P. 774

Memoranda

MORRIS BERMAN, Appellant, *v.* BOARD OF ELECTIONS OF THE CITY OF NEW YORK, et al., Respondents.

Argued September 19, 1966; decided October 18, 1966.

Elections—church as polling place—Special Term dismissed, for legal insufficiency, complaint wherein plaintiff sought to recover from Board of Elections and individual commissioners thereof damages allegedly sustained by him by reason of culpable negligence on part of defendants and triple damages for alleged malice on their part in designating church-operated building as place for registration of voters and holding of elections—complaint was properly dismissed.

Berman v. *Board of Elections of City of N. Y.*, 26 A D 2d 620, affirmed.

APPEAL, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered June 30, 1966, which unanimously affirmed (1) an order of the Supreme Court at Special Term (MITCHELL D. SCHWEITZER, J.; opinion 49 Misc. 2d 713), entered in New York County, granting a motion by defendants, the Board of Elections of the City of New York and the individual commissioners thereof, to dismiss the complaint for legal insufficiency and (2) the judgment entered thereon. The action was commenced to recover damages allegedly sustained by plaintiff by reason of culpable negligence on the part of defendants and triple damages for alleged malice on their part in designating a church-operated building as a place for the registration of

voters and for the holding of elections. The complaint alleged, in part, that in 1964 plaintiff was a qualified voter and a resident of the then 41st Election District of the Fourth Assembly District, New York County; that, although schools sufficient in number for utilization as polling places were located in the area, defendants designated a building controlled by St. George's Ukrainian Catholic Church as the polling place for plaintiff's election district, and that, as a result of defendants' abuse of discretion and culpable negligence in making this designation, plaintiff, an adherent of a religion other than that of the designated church, was unable to register without compromising his religious beliefs, voted but was unable to concentrate while doing so, was compelled to differentiate his religion publicly in a community where other religions predominated and lost opportunities to register with a party which represented his political views and to make personal connections that could have furthered his career and financial status. Special Term stated that plaintiff did not specify the basis for the damages he claimed to have sustained; that inconsistency was revealed in his claim that the said designation of a church in effect prohibited his registration in a party but did not prohibit his voting at the general election; that no basis apparently existed for his assertion of culpable negligence or malice on the part of defendants; that section 66 of the Election Law mentioned churches as among those specific places where registration and voting might be conducted, and that the action did not properly raise the matter of the constitutionality of said section.

Morris Berman, appellant in person.

J. Lee Rankin, Corporation Counsel (*Peter Linzer* and *Seymour B. Quel* of counsel), for respondents.

Order affirmed, without costs; no opinion.

Concur: Chief Judge DESMOND and Judges FULD, VAN VOORHIS, BURKE, SCILEPPI, BERGAN and KEATING.

APPENDIX C

Extract from Section 66 of the N. Y. State Election Law

§ 66. Designation of places for registry and voting

1. On the third Tuesday of August in each year, or within the period of thirty days immediately prior thereto, the board or body empowered by this chapter to create or alter the election districts of a city or town shall designate the place in each election district in the city or town at which the meetings for the registration of voters and the elections and primaries shall be held during the year following the ensuing first day of October. No place shall be so designated in which there is located any business licensed under the provisions of the alcoholic beverage control law. A list of the places so designated shall be filed in the office of the board of elections. In a city or town the place so designated, if a schoolhouse, *church*, library or other public building, or a portable voting house, may be in a contiguous election district. Wherever any election district contains less than fifty registered voters and is less than one square mile in area, the place so designated may be the designated polling place in a contiguous election district.

APPENDIX D

Civil Rights Law of 1964

TITLE I—VOTING RIGHTS

Sec. 101. * * *

"(2) No person acting under color of law shall—

"(A) in determining whether any individual is qualified under State law or laws to vote in any Federal election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote; * * *."

APPENDIX E

N. Y. Civil Practice Act and Rules

§ 104. Construction (1964)

The civil practice law and rules shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding.

R 3014. Statements.

Every pleading shall consist of plain and concise statements in consecutively numbered paragraphs. Each paragraph shall contain, as far as practicable, a single allegation. Reference to and incorporation of allegations may subsequently be by number. Prior statements in a pleading shall be deemed repeated or adopted subsequently in the same pleading whenever express repetition or adoption is unnecessary for a clear presentation of the subsequent matters. Separate causes of action or defenses shall be separately stated and numbered and may be stated regardless of consistency. Causes of action or defenses may be stated alternatively or hypothetically. A copy of any writing which is attached to a pleading is a part thereof for all purposes.

APPENDIX F

The Jewish Press
July 16, 1965

Voting Booths in Churches

* * * In many areas of our city, during registration and elections, churches and synagogues are used for voting purposes.

In some areas, schools, barber shops, candy stores or any place in a community * * * most convenient to the public is utilized.

* * * We have been told that many voters in certain areas, rather than enter a church, have given up their right to vote. In other cases, those who realized the voting would be held in a church have sent away for absentee ballots, explaining they would be out of town on Election Day. Of course, this was one way of settling the problem —but, not the right way.

We realize that pulling voting booths out of churches and synagogues will affect the finances of these institutions, but, we also feel no amount of money should sell our right of separation of church and state, especially when it is against the religious belief of the voter to enter a church.

Compilation of Jewish Laws and Customs
(From the Shulchan Aruch)

5. It is forbidden to look (in admiration) at idols and their ornaments, for it is written (Leviticus 19:4): "Ye shall not turn to idols." One must keep away from a house of idolatry, and especially from the idol itself, a distance of at least four cubits.* * *

Entering A Church
(By Rabbi Sholom Klass, in the Jewish Press)

Entering a church for any purpose other than absolute necessity is forbidden.* * *

APPENDIX G

Page of a List of Church Polling Places in New York City Used for Registration and General Election 1964 considered by the State Appellate Courts

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Names	*Location*	*Rental*
Church of Epiphany	1393 York Ave.	$ 99.00
St. Monica Church	413 E. 79th St.	231.00
St. Joseph Church	404 E. 87th St.	132.00
St. Thomas Church	262 W. 118th St.	198.00
St. Rose of Lima Church	510 W. 165th St.	132.00
Our Lady of Lourdes Church	472 W. 142nd St.	165.00
Holy Rood Church	715 W. 179th St.	297.00
K'Hal Adath Jeshurun	90 Bennett Ave.	99.00
St. Mathew Lutheran Church	202 Sherman Ave.	165.00
St. Stephen Church	144 W. 228th St.	132.00
Our Lady of Mt. Carmel	2234 1st Avenue	66.00
St. Paul Church	114 E. 118th St.	132.00